

International and Comparative Criminal Justice

The background of the cover features a globe with a grid of latitude and longitude lines. Overlaid on the globe is a dark silhouette of the European continent. The title text is centered over the map of Europe.

# **Democracy in the Courts**

## **Lay Participation in European Criminal Justice Systems**

**Marijke Malsch**

# Democracy in the Courts

Lay Participation in European  
Criminal Justice Systems

MARIJKE MALSCH

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Published by  
Ashgate Publishing Limited  
Wey Court East  
Union Road  
Farnham  
Surrey GU9 7PT  
England

Ashgate Publishing Company  
Suite 420  
101 Cherry Street  
Burlington, VT 05401-4405  
USA

[www.ashgate.com](http://www.ashgate.com)

### **British Library Cataloguing in Publication Data**

Malsch, M. (Marijke)

Democracy in the courts : lay participation in European criminal justice systems. - (International and comparative criminal justice)

1. Criminal procedure - Europe 2. Criminal courts - Europe  
3. Lay prosecutors - Europe 4. Democracy - Europe  
I. Title  
345.4'05

### **Library of Congress Cataloging-in-Publication Data**

Malsch, M. (Marijke)

Democracy in the courts : lay participation in European criminal justice systems / by Marijke Malsch.

p. cm. -- (International and comparative criminal justice)

Includes bibliographical references and index.

ISBN 978-0-7546-7405-4

1. Criminal courts--Europe. 2. Lay judges--Europe. 3. Juries--Europe. I. Title.

KJC9455.M35 2009

345.4'01--dc22

2008053603

ISBN 978-0-7546-7405-4



#### **Mixed Sources**

Product group from well-managed  
forests and other controlled sources  
[www.fsc.org](http://www.fsc.org) Cert no. SA-COC-1565  
© 1996 Forest Stewardship Council

Printed and bound in Great Britain by  
MPG Books Ltd, Bodmin, Cornwall.

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# Preface

This book is concerned with both the systems of lay adjudication in European countries and with the way lay people are involved in the administration of justice in practice. The book furthermore seeks to unravel the various arguments in favour of and against lay participation in the adjudication of cases. The design of the various European systems of lay participation differs strikingly, ranging from tribunals that decide almost without any professional input to fully professional decision making. For some countries discussed in this book the subject is highly topical. In Belgium the abolition of the jury was proposed but rejected and in the Netherlands a debate has taken place about introducing lay participation. Both the government and the House of Representatives decided not to proceed with any proposal for introducing lay adjudication in the Dutch legal system. As such, the country remains a conspicuous exception in the Western part of Europe.

Various methods have been used to investigate lay participation. The national systems of a large number of European countries have been studied by use of the literature, internet and other sources. Providing an overview of how jurisdictions involve ordinary citizens is, however, not sufficient for understanding how these systems work and how the public and participants appraise them. For that it is necessary to talk to the lay adjudicators directly as well as to the professional judges who, in one way or another, have to work with them. The interviews that were conducted with lay and professional adjudicators form an important part of this book.

Participation in the trial of cases is an overwhelming experience. At the same time, an ordinary citizen doing so may learn a lot about how the system works. Professional judges for their part may enjoy collaboration with people from outside the formal judiciary. Others, however, may experience the involvement of lay adjudicators as a hindrance to the speedy trial of cases. This book pays due attention to the actual experiences of the lay decision makers and their professional counterparts in five European countries. Observations of court sessions conducted in these countries and interviews contributed to a better understanding of lay and professional decision making and how the two groups perceive each other.

It was difficult to obtain funding for the research in the Netherlands. At first the Council of the Judiciary seemed enthusiastic about the research. They suggested a number of issues related to lay participation that could also be studied in the framework of the project. The project description was adjusted and widened to meet the Council's request. There followed a long delay before the Council came back to the researchers. In the meantime articles appeared in Dutch newspapers and in scientific journals in which professional judges



reflected on the negative sides of lay adjudication and their own fears regarding its introduction into the Dutch legal system. Finally, after negotiations lasting for more than a year, the Council ultimately declined, making it clear that it was not willing to pay for the research. However, the Council made available a compensatory grant which allowed the Netherlands Institute for the Study of Crime and Law Enforcement (NSCR) to nevertheless make a start with the project.

Fears of a comparable nature seemed to exist in Belgium, where the researchers were requested to emphasize in their report that the views presented were strictly their own. Naturally, we wish to comply with this request and hereby stress that the views and observations in this book are exclusively those of the researchers.

Although the three-year research on which this book is based thus had a slightly complicated and delayed start, the intention is to advance an informed debate about whether or not lay people should participate in trials. Until now, this discussion has unfortunately not always been as rational and as informed as one would wish. Extreme positions have been taken, for example in the Dutch context, which do not always seem to be justified by sufficient knowledge of the subject matter. It is surprising that both proponents and critics of lay participation could be found to hold such positions. Obviously, this is a highly emotional issue!

First of all, I want to express my gratitude to my former colleague Charissa Efstratiades, who contributed most valuably to the research, by cooperating in the setting up of the project and collecting information on the legal systems in the various European countries. An important portion of the observations and interviews was done in cooperation with her.

The supervisory committee that was instituted for this research consisted of Frits Bakker, president of the District Court of The Hague, and of professors Leny de Groot-van Leeuwen, Paul De Hert and Theo de Roos. The committee played an important role in appraising and monitoring the research and in coming up with suggestions for it. Fortunately, differing opinions existed within the supervisory committee with respect to suitability and desirability of lay participation and these differences were very helpful for the researchers in clarifying their own arguments. The same applies for the supervisory committee as was indicated previously: the views and opinions in this book are the researchers' alone and not those of the supervisory committee.

I owe special gratitude to many people who helped us find our way in the countries we visited, the trials we observed and the legal systems we investigated. All countries were very helpful in this respect. I specifically want to mention Barbara Flaxman, Cindy Barnett, Sally Dickinson, Martin Wasik, Lieve Gies, Jan Heuvelmans, Geert Vervaeke, Jan Snelders, Rachida Boumbarek, Tom Decaigny, Kira Kolby Christensen, Charlotte Meincke, Hanne Fog-Petersen, Nanna Blach, Anders Granhag, Dr Sojka, Dr Hornung, Dr Kilbinger, Stefani



Ross, René de Ruijter, Albert Klijn, Liene Malsch and my colleagues Peter van der Voort, Ariena van Poppel and Danielle Reynald.

Without the contribution of many judges, both lay and professional, who remain anonymous but who gave their time to cooperate in an interview, this research would have lacked the aspect which I find the most interesting: the views of those involved on how they experienced their contributions (and those of others) to the administration of justice.

*Marijke Malsch*

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# Chapter 1

## Introduction

Lay participation in the administration of justice differs between countries. Some countries, like the United Kingdom and the United States, have always attached considerable value to the participation of ‘ordinary people’ in the legal system in the form of juries. Other systems, like that of France, have at a later point in time adopted the view that citizen participation in the legal system is a necessary requirement of democracy. Citizen participation in a legal system may vary over time *within* countries as well. Countries such as Russia and Spain have recently re-introduced the jury into their legal systems after previously having abolished it. Other countries, such as Belgium, are discussing modifying their jury system and in the Netherlands, where lay participation in the legal system is largely absent, a small number of politicians have advocated the introduction of lay judges in criminal cases.

This book examines lay participation in judicial systems. It presents the results of interviews conducted with professional and lay adjudicators in five European countries. These interviews focus on the lay persons’ and the professional judges’ experiences of lay involvement and their perspectives on how the legal system operates in this respect. Alternatives to lay participation, such as an increased transparency and greater accessibility to the trial of cases, are discussed as well. An attempt is made to establish how far the various legal systems comply with certain democratic values. In the opening chapters the concept of ‘democracy’ is elaborated on, and the question is asked in how far the concept is applicable in the legal domain. In the final chapter, a model for democracy in courts is presented as a result of the research done for this book.

### **Arguments in Favour of Lay Participation**

Arguments in favour of and against citizen participation in a criminal justice system have been widely debated in many countries. Some arguments can cut both ways, in favour of and against lay participation. That is the case, for example, with the argument regarding ‘emotions’, which it is assumed can play a more substantial role with lay adjudicators (Malsch 2003). Emotions may stand in the way of an objective judgement about a case, but they might also be welcomed to prevent overly bureaucratic decision making by professionals. The same is true for the expense of lay participation. Some people stress the higher costs related to the principle of ‘immediacy’, which requires that all

witnesses and experts should be heard in open court and legal issues should be explained to the lay participants; immediacy is enforced more strongly when lay adjudicators are involved than when cases are dealt with only by professionals (van Koppen and Penrod 2003; Malsch and Nijboer 2005). Others, however, are of the opinion that the remuneration of lay participants is substantially lower than the salaries of professional judges, leading to reduced expenses for the judicial system as a whole in the case of lay participation (Casper and Zeisel 1972; de Roos 2006). In this section the arguments most likely to be identified as being in favour of lay participation are discussed. The next section deals with arguments against lay participation.

What are the arguments for offering citizens the opportunity to take part in the adjudication of cases? The democratic argument is the strongest and the most often expressed reason for lay participation: citizens should be able to take part in the trial of cases as representatives of the population at large. Deciding cases should not be the task of only a small elite, and everyone should at least have a chance of being appointed a member of a jury or to be called to act as a lay judge (Machura 2001; Ivkovic 2003; De Hert 2004b). The type of democracy that is served by such involvement is called 'representative democracy'. In the United States, a strong advocate of this type of democracy, the view is generally held that defendants have the right to be tried by their peers (Devine et al. 2001). There, juries are considered to be a safeguard against the power of the state or against other biases of appointed judges or corrupt officials. It is held that juries inject democratic values into the legal process and function as a source of 'common sense'.<sup>1</sup> Such a view is more or less absent in the Netherlands (de Roos 2006). Countries thus appear to differ in their reaction to this argument. One of the aims of this book is to uncover and examine these different types of approach between countries.

There is another aspect in support of the democracy argument: that the discussion of justice and the trial of cases would be enhanced if citizens had the opportunity to participate in the trial of cases. The gap between the population and the judiciary would be diminished if ordinary citizens were able to participate and to reach informed opinions on how the legal system works. By telling their family and friends about their experiences in the administration of justice, knowledge about the system would be spread and a discussion within the wider society made possible. Individuals would become better equipped to form their own opinion on the legal system if they participated in it. Their opinions would, then, be more informed by the actualities of the trial of cases than if the administration of justice remained the prerogative of a small group (Warren 1992; Young 2000).

Another argument supporting participation of citizens in the legal system is that this would be an incentive for the professionals to keep the trial of cases

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1 For a reflection on such values in jurisdictions that make use of juries, see Vidmar 2000.

comprehensible for lay people. Most lay adjudicators are not masters of legal language, so the professional judges, defence lawyers and prosecutors would be forced to use colloquial language to a greater degree than in a situation where the tribunal consists of professionals only. It may be hypothesized that the more lay people participate in the legal system, the more every-day language would be used (Enschedé 1982; Malsch and Nijboer 2005).

Directly related to the issue of comprehensibility are the aspects of orality and immediacy of the trial, referring to the degree in which process participants do or do not rely on written materials and the extent to which witnesses are heard in court. In legal systems where a jury or lay judges are involved, orality and immediacy of the trial are generally high. Lay participants are not expected to read the case file before the hearing of a case; they should be as unprejudiced and open-minded as possible (van Koppen and Penrod 2003). In an oral and immediate trial, the review of the evidence can be expected to be more direct and, therefore, to be more reliable than in a situation where all evidence is related in reports and handed over in written form to the decision makers (De Hert 2004b).

Participation by citizens would also enhance the system's legitimacy. Public confidence in the system would increase. Research from the social sciences, which indeed suggests that actual participation in a procedure may enhance acceptance of the outcome and respect for the authority that tries the case (Tyler 1990; Benesh 2006), is relevant to this point, and it serves as a background for the research presented in this book.<sup>2</sup>

Participation has certain effects on the citizens involved. They learn about the system, it educates them on the juridical aspects and they become knowledgeable about what kind of people commit particular types of crime, and how these crimes impact on the victims. It has been contended that in participating they develop a better understanding of the complexities involved in trying legal cases (Finkel 1995). By communicating with the professionals in the system, the distance between judges and lay people may be reduced.

Chapter 2 will elaborate on these arguments. In the chapters that follow, the book explores how these various arguments and aspects of democracy have found their place in the legal systems under review in this book.

## Arguments against Lay Adjudication

There are also important arguments for *not* having lay people decide cases in a legal system. Lay people do not have legal knowledge, which implies that a lot of explanation of the legal aspects will be required. Because all witnesses have to be heard again in court, and all items of evidence have to be presented and

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2 See Chapter 2.

explained, procedures take substantially longer. This requires time, and time is scarce nowadays in many legal systems (van Koppen and Penrod 2003).

It is contended that lay people would make more mistakes. They lack experience and familiarity with the routine, especially the members of a jury. They are generally less educated than the professional judges and thus there is a risk that they would not understand everything that is going on in court. Therefore the trial of cases would have to be simplified, at least to a certain degree. An elaborate doctrine on, for example, various types of guilt would not be appropriate in systems that make use of lay people. Such a complex doctrine could lead to misunderstandings or even miscarriages of justice, which cannot always be easily redressed. Such fears are regularly expressed with respect to systems that make use of a jury (van Langenhove 1989; Malsch 2003; Tubex and De Hert 2004). The drawbacks of the need for more explanation and the risk of mistakes appear to be common among the various jurisdictions discussed in this book, as the following chapters will make clear.

It is further argued that as a consequence of lack of familiarity with the routine in deciding cases, lay people would be more easily influenced by their emotions. Seeing a defendant who is accused of having killed his wife and daughter sitting just in front of you, hearing the details of the killings and seeing the pictures of the lifeless bodies in colour, may upset people who are not used to this. This is true for professional judges as well but, by and large, they become used to such aspects of serious crime. This type of horrific evidence produces a strong reaction particularly in those presented with it for the first time. During the trial lay people may be overwhelmed by their emotions, but they are not allowed to express them. Such emotions may lead to an overreaction in the opinions that they form of the case. Crimes that are highly upsetting may have such an impact that the decision makers want only the most serious penalty possible (Tubex and De Hert 2004). For this reason human rights organizations fear increased repressiveness if juries are introduced in a legal system; they expect the jury's opinion to be more extreme than that of panels including professionals (De Hert 2004a).

However, there are also indications that when lay people are involved in decision making their opinions change in such a way that they become more lenient. Learning about the defendant's background and motives may induce empathy in the decision maker, leading to a more balanced opinion on the case (Diamond 1990). In some cases the balance may even swing to the other side: lay people acquire so much empathy that they only want the lowest penalty or even an acquittal of an apparently culpable defendant (Kalven and Zeisel 1966). In such a situation cooperation with a professional judge might help to maintain balance in opinions.

Other effects of inexperience may also occur: attractive defendants, witnesses and victims may affect the opinions of lay adjudicators to a larger extent than those of professional judges who, thanks to their experience, have acquired some degree of immunity to appearances. It is feared that jurors

would judge attractive defendants more leniently than unattractive defendants (Kalven and Zeisel 1966; Hastie et al. 1983; Wasserman 1985). Defence lawyers often make use of such an effect by suggesting that the defendant puts on certain clothes or behaves in certain ways. Naturally, such effects can be found in professional systems as well, but according to some these would be less prominent (Klik and van Koppen 2002).

In jury cases media coverage often plays an important role in shaping public opinion of a trial, as can be seen in the American criminal case of O.J. Simpson and the Belgian case of Dutroux. In contrast, cases involving lay judges, as can be found in Germany and in the Scandinavian countries, are hardly ever covered by the media. In these countries the media play a far less dominant role in the dissemination of information regarding criminal trials. The influence of media coverage, thus, differs between legal systems (Tubex and De Hert 2004).

This book pays due attention to the disadvantages outlined here. In all countries under review, these and other drawbacks have been mentioned, but the respondents attach differing degrees of value to them. Many of these disadvantages imply that democracy is hindered in one way or another, or that the quality of decision-making is reduced. The book assesses how far limitations on one aspect of democracy can be complemented by other aspects of democracy that are better served in that country.<sup>3</sup>

## Research Relating to Participation

There is a vast body of research into *procedural justice* focused on perspectives of the individuals who take part in a procedure, such as plaintiffs, defendants, victims and witnesses (Thibaut and Walker 1975; Lind and Tyler 1988; Tyler and Lind 1992; Röhl and Machura 1997). Participants in a procedure who have been given the opportunity to express their own opinions and to present evidence to the decision maker are generally more satisfied about the outcome than people who have not been offered such opportunities (Röhl and Machura 1997). Being able to exert influence on procedures and on the outcome is therefore of relevance for acceptance of the decision (Malsch 2004). Similar effects may be expected when people can take part in the legal system itself by acting as a juror or as a lay judge. They may, in such a situation, not perceive themselves as outsiders. They are listened to and their opinion contributes to the decision that is made. Even when their own opinion on a case does not become the 'final' decision, they have had the opportunity to make a statement about what they think of the case (Bovens 2006). In legal systems where no lay participation exists, such opportunities are withheld from the general public and this may widen the gap between society and the judiciary. Research into

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3 For a final overview of aspects of democracy in legal systems, see Chapter 11.



procedural justice serves as a general background to the research described in this book. The general thesis which the analysis in this book takes as its starting point is that commitment to and involvement in a system may increase satisfaction with the operation of that system. This thesis is further explored in Chapter 2.

### **What Types of Lay Adjudication Exist?**

In earlier times the involvement of citizens in the trial of cases was the natural and self-evident situation. Every (male) citizen had the duty to act as a lay judge or to assist in the trial of cases in other ways when called to do so. Later, after the Middle Ages, the trying of cases increasingly became the task of delegates who gradually developed into professionals (van de Pol 1986; Malsch and Nijboer 2005). In most countries decision making by lay people has continued alongside or in combination with the trial of cases by professionals. The various forms of lay participation that exist nowadays in Europe bear a relation to the national histories of each country and the influences exerted by other jurisdictions. In this way Europe appears to be far more diversified than, for instance, the United States, where each individual state has a jury system that, as far as can be discerned from this side of the ocean, resembles that of the other states to a large degree (Vidmar 2000; Devine et al. 2001).

In Europe there are countries that have only juries and no lay judges in criminal law, there are countries that have only lay judges who decide cases together with a professional judge or judges and there are countries that have both. Luxembourg and the Netherlands, along with a number of the former communist countries, have none of these (Jackson and Kovalev 2006; de Roos 2006). Chapter 3 of this book presents an overview of the legal systems of a large number of mostly Western European countries. For each country we established what forms of lay participation are to be found in the trial of criminal cases, when the involvement of lay people was introduced in the system and the decision making power of each panel. An assessment was made of the proportion of criminal cases that were tried with the help of lay people. The variety of forms of lay participation is striking. This makes the question of how the arguments in favour of and against lay participation work out for each system a challenging one.

### **The Lay Person and the Professional**

The definition of a lay person is clear. It is a man or woman who has no, or almost no, education, training and experience in a certain field. The term 'lay person' always refers to a specific situation: lay people are non-professionals in many fields, but most of the time not in all fields. They often

possess expertise in at least a few areas. A schoolteacher is not a professional in medicine and a judge generally knows nothing about agriculture. It is less clear what the definition of a professional is (Malsch and Nijboer 1999). Naturally, professionals have followed certain education or training and have obtained specific qualifications. On top of that, they generally have experience in a certain field. It is often the case that this sort of experience turns into some sort of routine. Professionals usually specialize in a certain area. This throws up a number of questions: is a person who has the training but no experience in dealing with cases a professional, or does a professional need to have practical working experience? How much experience should someone have before we can label them a professional? Where does the boundary lie between lay people and professionals in this respect?<sup>4</sup>

Questions of this type are particularly pertinent to the subject of lay participation in a legal system. In case of the members of a jury, it is clear that we are dealing with lay people. For most of them it is the first time that they will have participated in a trial, and it will also be their last opportunity to do so (de Roos 2006). It is less common for members of a jury to repeat their participation as it is for the lay judges such as can be found in Germany and the Scandinavian countries.<sup>5</sup> This implies that members of a jury are unable to acquire certain sorts of experience. The situation is different for lay judges and even more different for the magistrates and Justices of the Peace who function in a number of English-speaking countries. They act as a judge for a given period (often four years) which can be, and most of the time is, extended, in some occasions even until their retirement. They acquire knowledge of legal matters and legal procedures. This longstanding involvement gives them the opportunity to develop experience, and sometimes even routine. In the five countries that have been investigated in more depth, the issue of the degree of professionalism of decision makers has been discussed with judges and lay participants.

Another element that may lead to experience and expertise, is cooperation with the professional judges. This occurs most visibly with lay judges who work closely with professional judges. Juries in some legal systems also make decisions about the sentence in cooperation with professional judges, but the decision about guilt is generally made without the professionals. The ‘summing up’ by the professional judge before the jury retires to make a decision about the defendant’s guilt contributes to the jurors’ legal knowledge. Cooperation with and the instruction by the judge may be seen as a sort of educational process for the lay participants, which it could be said makes them less of a lay person. Magistrates and Justices of the Peace generally sit without a professional judge, but in deciding cases over many years they become highly

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4 These and similar issues are addressed in Chapter 4.

5 See Chapter 3 for an explanation of the legal systems in a large number of European countries.